SERVED: June 28, 1996

NTSB Order No. EA-4464

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of June, 1996

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. ANTON G. ZUKAS, Respondent.	)	Docket SE-14125

OPINION AND ORDER

The respondent has appealed from a decision Administrative Law Judge William E. Fowler, Jr., served on October 24, 1995, granting the Administrator summary judgment on respondent's appeal from an order revoking his commercial pilot certificate.[1] The law judge concluded that on the undisputed allegations in the Administrator's amended order of revocation, dated August 17,

[1]A copy of the law judge's order is attached.

1995, concerning respondent's federal court drug conviction, revocation of his airman certificate was required under 49 U.S.C. § 44710(b).[2] For the reasons discussed below, the appeal will be denied.[3]

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[2]49 U.S.C.A. § 44710(b) provides as follows:

> **§ 44710. Revocations of airman certificates for controlled substance violations**
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> * * *
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> **(b) Revocation.--(1)** The Administrator of the Federal Aviation Administration shall issue an order revoking an airman certificate issued an individual under section 44703 of the title after the individual is convicted, under a law of the United States or a State related to a controlled substance (except a law related to simple possession of a controlled substance), of an offense punishable by death or imprisonment for more than one year if the Administrator finds that--
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> **(A)** an aircraft was used to commit, or facilitate the commission of, the offense; and
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> **(B)** the individual served as an airman, or was on the aircraft, in connection with committing, or facilitating the commission of, the offense.

Although not referenced in the law judge's October 24 Order, the Administrator, in his original order of revocation, dated May 11, 1995, and in the amended order, had also predicated the revocation on section 61.15(a)(2) of the Federal Aviation Regulations, 14 C.F.R. Part 61. That provision, which establishes in this case an additional, independent basis for revoking respondent's certificate, reads as follows:

> **§61.15 Offenses involving alcohol or drugs.**
>
> (a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs is grounds for --
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> * * *
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> (2) Suspension or revocation of any certificate or rating issued under this part.

[3]The Administrator did not file a reply to the respondent's appeal brief, a circumstance which prompted respondent to file a request for a default judgment in his favor. However, contrary

In his August 17, 1995 Amended Order of Revocation, which served as the complaint in this action, the Administrator alleged, among other things, the following facts and circumstances concerning the respondent:

> 1. At all times material herein you were and are now the holder of Commercial Pilot Certificate No. 263743302.
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> 2. On or about November 5, 1986, you operated a Piper Navajo, a civil aircraft, on a flight from Miami, Florida to Austin, Texas.
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> 3. On or about November 6, 1986, drug agents searched the above-described aircraft and found therein two bags of cocaine.
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> 4. At the time of the above-described search, you had knowledge that the Piper Navajo had within it two bags of cocaine.
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> 5. On or about June 26, 1987, in the U.S. District Court for the Western District of Texas, you were convicted of Conspiracy to Possess with Intent to Distribute Cocaine, a felony under Federal law, and you were sentenced to serve 15 years in prison as a result of that conviction.
>
> 6. The above-described conviction related to your use of an aircraft.

As noted by the law judge, the respondent essentially admits all but the fourth of these allegations, and it is his asserted denial of knowledge that cocaine was aboard the aircraft that forms the basis for one of the few arguments he raises on appeal

(..continued)
to respondent's apparent belief, Rules 55(a) and 8(d) of the Federal Rules of Civil Procedure do not apply to Board proceedings, and the Board, under its rules of practice, does not automatically grant appeals with respect to which no reply is received. Rather, the merits of such an appeal, like those to which a reply is submitted, are assessed in light of the specific objections to the law judge's decision the appealing party has presented. The request for a default judgment is accordingly denied.

that warrants comment.

Respondent argues that revocation cannot be sustained under FAR section 61.15 or 49 U.S.C.A. § 44710 because his plea of guilty to the federal drug charges for which he is currently incarcerated did not constitute an admission that he had knowingly violated any drug law.[4] Since, according to the respondent, knowledge is a necessary element of a charge under either of those provisions of law, the order of revocation must be dismissed. We find no merit in the argument. Even in the unlikely event that respondent's guilty plea did not, as a matter of criminal law, reflect a concession that the federal drug offenses were willful, we do not agree that the Administrator, absent proof that the conviction involved scienter, could not take certificate action under FAR section 61.15 or would not be required to revoke a certificate under § 44710(b). To the contrary, we think these provisions of law would be rendered largely meaningless if the facts underlying a drug conviction had to be relitigated before the Board in order to determine whether it supported a regulatory response.

A conviction for a drug offense that did not involve willful conduct might have a bearing on sanction in a proceeding brought solely on the basis of FAR section 61.15. However, nothing in

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[4]Respondent pleaded guilty to 21 U.S.C.A. § 841(a)(1), which makes it "unlawful for any person knowingly or intentionally...to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," and 21 U.S.C.A. § 846, which forbids attempting or conspiring to commit offenses such as those proscribed in § 841.

that regulation or in § 44710(b) supports the view that their applicability is in any way dependent on whether "guilty knowledge," or scienter, was an element of the underlying drug charge prosecuted in the state or federal court where the conviction was obtained, and we decline to read into the regulation or the statute a precondition to their use which would subject such convictions to collateral challenge here.[5]

In sum, it seems to us that the willfulness of the airman's conduct under the regulation is relevant, if at all, only to the choice between suspension and revocation and that, under the statute, it makes no difference whether the airman's conduct was purposeful or otherwise, for revocation is mandated whenever a conviction involves, as does the one before us, certain described conditions.[6] Since respondent was charged under both provisions, his alleged lack of intent to commit the drug offenses for which he was convicted has no impact on the question of sanction in

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[5]There is, moreover, no doubt that the Administrator has no discretion to substitute his judgment for the statute's as to whether an airman whose conviction falls within the parameters of § 44710(b) must be revoked. Section 44710(3) specifically states that the Administrator "has no authority...to review whether an airman violated a law of the United States or a State related to a controlled substance."

[6]The statute could be construed to incorporate a judgment that a conviction exposing an airman to revocation under § 44710(b)(1) involved an intentional drug offense. In this connection, we note that under § 44710(b)(2) an airman who may not have been prosecuted criminally must be revoked if the Administrator finds that he *knowingly* engaged in activity for which a conviction under § 44710(b)(1) would require revocation. Reading the two sections together, the conclusion seems inescapable that where a conviction under the former section has been obtained, the issue of knowledge has been resolved, for purposes of the mandatory sanction it specifies.

this case.

Respondent's other arguments warrant little discussion. The law judge has previously, correctly advised respondent that the Board's stale complaint rule (49 C.F.R. Section 821.33) does not apply where, as is true in this case, the Administrator's allegations present an issue of airman qualification. See Order, served September 7, 1995. Thus, it is of no consequence that the Administrator's revocation order was not issued until well after the six-month period following the respondent's drug conviction. Further, as the law judge explained to the respondent, consideration of ex post facto principles is not within the scope of a non-criminal, administrative proceeding,[7] and, as we have repeatedly held, the revocation of an airman certificate for reasons that have produced punishment in criminal court is not precluded by the U.S. Constitution's Double Jeopardy Clause. See, e.g., Administrator v. Guslander, NTSB Order EA-4431 (served March 6, 1996).

[7] Administrator v. Hernandez, NTSB Order EA-3821 (1993). We note, nevertheless, that even if ex post facto principles applied here, they would not bar the Administrator from amending, consistent with the Board's rules of practice, his complaint to add another legal allegation in support of his position that previously described conduct warranted revocation.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied; and

2. The October 24, 1995 decision of the law judge is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.